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in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1238

ALAN KLAES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, ALAN KLAES, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1972.

OPINION BELOW

The opinion rendered in this matter by the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix hereto and is designated as Appendix "A".

The petition for rehearing filed by the Defendant Klaes was denied on February 28, 1972. A copy of said denial of the petition for rehearing is attached hereto as Appendix "B". No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on February 4, 1972. A timely petition for rehearing was denied on February 28, 1972, and this petition for certiorari was filed within 30 days of that date. The Court's jurisdiction is invoked, under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether an Indictment should be dismissed which is based solely upon hearsay testimony presented to a Grand Jury when direct competent evidence is readily available.

STATUTORY PROVISIONS INVOLVED

Fifth Amendment to
The Constitution of the United States

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in a land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to
The Constitution of the United States

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 18, United States Code,
Section 3500 (b), (e) (3)

(b) "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

(e) "The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

STATEMENT OF THE CASE

On January 20, 1971, the Petitioner, Alan Klaes, was charged by Indictment with a violation of Title 21, United States Code §176(a) and with a violation of Title 26, United States Code §4704. This Indictment was sought from the Grand Jury sitting in the Southern District of Florida.

The only witness to testify for the Government before the Grand Jury was Special Agent Allen Yarborough, United States Bureau of Customs. The testimony given by Agent Yarborough to the Grand Jury to seek the Indictment was almost entirely hearsay. A co-conspirator James Mairs, who at that time had become a Government witness, was not brought to the Grand Jury to testify. Another undercover agent, Doug Rodey, also did not appear to testify to the Grand Jury. Both Mairs and Rodey were major Government witnesses and were available to the Government to be brought to the Grand Jury. No other Customs Agents who worked on the case were presented to the Grand Jury.

The Defendant entered a plea of not guilty. Thereafter the Defendant filed pre-trial motions, including a Motion to Dismiss on the grounds that the Indictment was based solely on hearsay when other more competent evidence was available to the Grand Jury. On May 11, 1971, the Defendant entered a plea of nolo contendere as to Count 2 of the Indictment, the violation of Title 26, United States Code, §4704. This plea was entered based on a plea bargaining agreement between the Defendant and the Government pursuant to which this appeal was taken. On August 20, 1971, the Court adjudged the Defendant guilty and sentenced him to 30 months imprisonment.

REASON FOR GRANTING WRIT

THAT AN INDICTMENT SHOULD BE DISMISSED WHICH IS BASED SOLELY UPON HEARSAY TESTIMONY PRESENTED TO A GRAND JURY WHEN DIRECT COMPETENT EVIDENCE IS READILY AVAILABLE.

The Petitioner submits that the Indictment against him in the instant case should have been dismissed by the trial court since it was based solely on hearsay testimony presented to the Grand Jury when other competent evidence was readily available.

In the instant case the Court below predicated its ruling upon this Honorable Court's opinion in *Costello v. United States*, 305 U.S. 359 (1956). The Court below apparently felt that *Costello* laid to rest the question of the propriety of predicating an Indictment only upon hearsay testimony.

This however is not the case since the essence of the *Costello* opinion is that a rule preventing Indictments from being solely predicated on hearsay testimony would "add nothing to the assurance of a fair trial" (*Costello v. United States*, 305 U.S. at 364). Thus, the Court in *Costello* held that although predicating an Indictment only on hearsay testimony, is not error of constitutional proportions under the Fifth Amendment requirement of Grand Jury indictment, the opinion was also clearly predicated on the fact that no Fifth Amendment due process violation was involved.

Since the opinion in *Costello* was rendered, a major statutory change has been promulgated by Congress which negates the entire thrust of the holding in *Costello*. Title 18, United States Code, Section 3500 (e) (3) now requires that Grand Jury testimony of witnesses be provided to the Defendant. As a result, to allow the Government to circumvent the Congressional purposes enunciated in Title

18, United States Code, Section 3500 (e) (3) by predicating an Indictment solely on the hearsay testimony of one or two people, should not be sanctioned.

The Petitioner submits that the Government should not be permitted to frustrate a purpose of the aforementioned Jencks Act discovery by intentionally not bringing to the Grand Jury those witnesses who will testify at trial.

The propriety of the Government seeking and securing indictments exclusively on hearsay testimony, when other direct evidence is available, has been a much discussed issue in the Second Circuit Court of Appeals. In a series of decisions which fully analyze the question, the Second Circuit has arrived at a position that such indictments cannot stand, when the Defendant is prejudiced by such a method of obtaining his indictment. *United States v. Payton*, 363 F.2d 996 (2nd Cir., 1966); *United States v. Umans*, 368 F.2d 725 (2nd Cir., 1966); *United States v. Beltram*, 388 F.2d. 449 (2nd Cir., 1968) and *United States v. Leibowitz*, 420 F.2d. 39 (2nd Cir., 1969). See also *United States v. Arcuri*, 282 F.Supp. 347 (E.D.N.Y. 1968) and *United States v. Gramolini*, 301 F.Supp. 39 (D.R.I. 1969).

The Petitioner urges that this Honorable Court exercise its power to supervise the administration of justice in the Federal Courts and enunciate a rule that the deliberate use of hearsay evidence only to secure an indictment from a Grand Jury, will not be tolerated when other direct and competent evidence is readily available and the Defendant is prejudiced by the use of the hearsay testimony.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES J. HOGAN
Penthouse
420 Lincoln Road
Miami Beach, Florida

ALAN E. WEINSTEIN
Penthouse
420 Lincoln Road
Miami Beach, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of March, 1972, a copy of the above Petition for Writ of Certiorari, was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. and to Robert W. Rust, Office of the United States Attorney, Miami, Florida.

I FURTHER CERTIFY that all parties required to be served have been served.

_____

JAMES J. HOGAN

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2765
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALAN KLAES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(February 4, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

PER CURIAM: Klaes' sole contention is that only hearsay evidence was presented to the grand jury, and therefore the indictment should have been dismissed. This contention is without merit. See Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L. Ed. 397 (1956); United States v. Gower, 447 F.2d 187 (5th Cir. 1971). The judgment is

AFFIRMED.

*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

FEBRUARY 28, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 71-2765 — U. S. A. vs. Alan Klaes

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Carol A. Gaudet
Deputy Clerk

/cg

cc: Messrs. James J. Hogan
Alan E. Weinstein

Mr. Charles O. Farrar, Jr.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1238

ALAN KLAES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged in a two-count indictment filed in the United States District Court for the Southern District of Florida with the smuggling and sale of marijuana (21 U.S.C. (1964 ed.) 176a) and the purchase and sale of cocaine (26 U.S.C. (1964 ed.) 4704(a)). After filing a motion to dismiss the indictment on the ground that it was based solely on hearsay evidence when non-hearsay evidence was available, petitioner pleaded nolo contendere to the

count charging an offense under 26 U.S.C. 4704(a). Petitioner was sentenced to imprisonment of two and one-half years. The court of appeals affirmed *per curiam* (Pet. App. A). Pursuant to a stipulation, entered into prior to the plea, petitioner had reserved the right to raise the issue on appeal.

Petitioner, as in the court below, argues that the indictment was invalid because founded on hearsay testimony of a narcotics agent. The argument is without merit. In *Costello* v. *United States*, 350 U.S. 359, this Court refused to "establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence." Mr. Justice Black, writing for a unanimous Court, observed that there were no persuasive reasons advanced for establishing such a rule and that its adoption "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change" (350 U.S. 364).

Contrary to petitioner's argument, the recent amendment to 18 U.S.C. 3500, which permits defendants to obtain the grand jury testimony of a trial witness after the completion of the direct examination, does not warrant re-examination of the *Costello* decision. The amendment to 18 U.S.C. 3500 merely codified what had by and large become the general practice of permitting defendants to use grand jury minutes for impeachment purposes. *Dennis* v. *United States*, 384 U.S. 855. And the argument advanced

here, that indictments based upon hearsay evidence frustrate the policy of disclosure, has been rejected by the very decisions of the Court of Appeals for the Second Circuit upon which petitioner relies. In *United States* v. *Payton*, 363 F. 2d 996 (C.A. 2), certiorari denied, 385 U.S. 993, the court of appeals sustained the validity of an indictment based on hearsay. In so doing, the court said (363 F. 2d 999):

> There is no doubt that under proper circumstances, defendants are allowed access to grand jury minutes for the purpose of pointing out inconsistencies with trial testimony, Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 LEd.2d 973 (1966), and cases cited in id. n. 21, and there is no possibility of doing this with a trial witness who did not testify before the grand jury. However, appellant has taken a rule of access formulated to expose inconsistencies and has turned it upside down to prove a requirement that a witness appear before a grand jury so that an inconsistency may be created. This argument is a non sequitur. We will continue to hold, of course, that a defendant may prove inconsistencies at trial with prior statements to a grand jury; we do not hold that a defendant may require prior statements to a grand jury simply to create inconsistencies at trial. * * *

The Court of Appeals for the Second Circuit has consistently held that "[i]ndictments obtained principally or wholly upon the basis of hearsay evidence, even though direct testimony was available, will not be dismissed unless it appears that dismissal is required to protect the integrity of the judicial process."

United States v. *Leibowitz*, 420 F. 2d 39, 42 (C.A. 2). Such circumstances may arise either when the grand jury is deliberately misled into thinking it is getting eyewitness testimony or when the defendant is able to demonstrate a "high probability" that with eyewitness testimony rather than hearsay testimony the grand jury would not have indicted (*ibid.*). *United States* v. *Catalano*, 439 F. 2d 1100, 1102 (C.A. 2); *United States* v. *Rosenstien*, 434 F. 2d 640, 641 (C.A. 2). The petitioner does not suggest that either of those circumstances is present in this case. Moreover, with respect to count II of the indictment, the only count to which petitioner pleaded nolo contendere and the only count on which he was convicted, the evidence before the grand jury was not based on hearsay but on the eyewitness testimony of the United States Customs Agent who found the cocaine in petitioner's home at the time of the arrest. Transcript of Proceedings on Motion to Dismiss, May 11, 1971, pp. 33-35; Grand Jury Minutes, January 20, 1971, p. 21.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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[1] The Grand Jury Minutes were marked as Exhibit 2 at the hearing on the motion to dismiss (Tr. 11-12).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 463739 681